

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 02-278
The Telephone Consumer Protection Act)	
Of 1991)	

COMMENTS OF NATIONAL PUBLIC RADIO, INC.

National Public Radio, Inc. (“NPR”) hereby submits its Comments in response to the Federal Communications Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.¹ In the NPRM, the FCC seeks comment on whether to revise its rules adopted pursuant to the Telephone Consumer Protection Act of 1991 (the “TCPA”),² and, in particular, whether to revisit the establishment of a national do-not-call list for telemarketers.

NPR supports the Commission’s efforts to examine the impact of new telemarketing techniques on consumer privacy. However, if the Commission decides to address these concerns by establishing a national do-not-call list, NPR urges the Commission to exempt telephone solicitations made by or on behalf of tax-exempt organizations or public broadcasters. This exemption should apply regardless of whether the Federal Trade Commission (“FTC”) adopts its proposal to prohibit for-profit

¹ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, CG Docket No. 02-278, CC Docket No. 92-90 (terminated), FCC 02-250 (released September 18, 2002).

² Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

companies that solicit donations on behalf of charitable organizations from calling individuals who have placed themselves on a national do-not-call registry.³ Such an exemption is consistent with the FCC’s current interpretation of the TCPA and is necessary to protect the fundraising capabilities of public radio stations.

If the Commission does not exempt calls made by or on behalf of charitable organizations or public broadcasters, it should at least exempt all calls made to current or former members of a public radio station. Such an exemption is required by the TCPA’s “established business relationship” exemption. The Commission also should exempt all calls to businesses, since the TCPA was designed to protect residential telephone subscribers, not businesses.

I. Background

A. Telephone Solicitations by NPR Members

NPR is a non-profit membership corporation that produces and distributes noncommercial educational programming through more than 640 public radio stations nationwide. Among its award-winning programs are *All Things Considered*[®], *Morning Edition*[®], *Talk of the Nation*[®], and *Performance Today*[®]. NPR also operates the Public Radio Satellite Interconnection System and provides representation and other services to its member stations.

NPR’s member stations are licensed to a variety of institutions, including nonprofit community organizations, universities, and state and local governments. NPR member stations rely heavily on contributions from individuals to fund the production

³ See Telemarketing Sales Rule, Notice of Proposed Rulemaking, Federal Trade Commission, 67 Fed. Reg. 4492 (January 30, 2002) (FTC NPRM) (proposed Rule 310.4(b)(1)(iii)(B)).

and acquisition of programming and other operational costs. In fact, individual contributions are the largest source of revenue for public radio stations, comprising 31.4% of the total revenue for public radio in 2000.⁴ Public radio stations raise funds from individuals through a combination of on-air membership drives, fundraising events, direct mail and telephone solicitations. The money raised through telephone solicitations represents an important source of revenue that public radio stations, which operate on very tight budgets, can ill afford to lose.

Telephone solicitations by or on behalf of a public radio station typically consist of calls to current and former members of the station, encouraging them to renew their memberships, serve as challenge grantors in on-air membership drives, or contribute to other special fundraising efforts. These telephone solicitations sometimes include calls to prospective members, such as individuals who have participated in station contests.

Some public radio stations use staff or volunteers to make these calls. However, most public radio stations lack the staff, equipment and/or expertise to make telemarketing calls in-house. Therefore, public radio stations frequently turn to for-profit companies that specialize in telephone solicitations on behalf of public broadcasters or other charitable organizations. Public radio stations take careful steps to control the activities of telemarketing companies making calls on their behalf in order to protect the privacy of their members and listeners. For example, Minnesota Public Radio reviews and approves all telemarketing scripts used by its fundraisers. It also requires all telemarketing calls to be recorded so that it can monitor the activities of its fundraisers. Minnesota Public Radio maintains an internal do-not-call list and prohibits “cold” calls

⁴ See Public Broadcasting Revenue, FY 2000, Corporation for Public Broadcasting, March 2002, Table 2, reprinted at <http://stations.cpb.org/system/reports/revenue>.

on its behalf to individuals who are not current or former members or do not otherwise have a relationship with Minnesota Public Radio.

B. NPR's Comments Regarding the FTC's Proposal To Establish a National Do-Not-Call Registry

On January 30, 2002, the FTC proposed a number of changes to its Telemarketing Sales Rule, 16 C.F.R. Part 310, including a proposal to establish a national do-not-call registry. Under the proposed rule, telemarketers – including for-profit companies that solicit donations for or on behalf of charitable organizations – would be prohibited from calling consumers (and businesses, in the case of requests for charitable contributions) who have placed themselves on a national do-not-call registry administered by the FTC unless they have provided their express verifiable authorization for the call. NPR submitted Comments to the FTC on April 15, 2002, urging the FTC to exempt all telephone solicitations made on behalf of public broadcasters from the do-not-call registry requirements. If the FTC fails to exempt public broadcasters from the do-not-call registry requirements, NPR argued that, at the very least, all telephone solicitations made on behalf of public broadcasters to current or former members of the station should be exempt from the requirements. NPR also argued that calls to businesses requesting charitable contributions should be exempt from the do-not-call registry requirements, just as all other calls to businesses are exempt from such requirements. The FTC proceeding remains pending.

C. The FCC's Request for Comment on Establishment of a National Do-Not-Call List

On September 18, 2002, the FCC released the NPRM seeking comment on, among other items, whether to revisit the establishment of a national do-not-call list for

telemarketers.⁵ If it decides to establish a national do-not-call list, the Commission asks how its list should be coordinated with any FTC list and various state lists. The Commission notes that the FTC proposes to extend the national do-not-call list requirement to telephone solicitations made by for-profit entities on behalf of charitable organizations. The Commission also points out that it has previously determined that the TCPA's exemption for tax-exempt organizations extends to telephone solicitations made by for-profit entities on behalf of tax-exempt organizations as well. Therefore, the FCC seeks comment on whether its earlier interpretation raises possible inconsistencies with the FTC's national do-not-call list proposal and, if so, how these inconsistencies can be reconciled.⁶

II. If the Commission Decides To Adopt Do-Not-Call Registry Requirements, Public Broadcasters Should Be Exempt From The Requirements.

If the Commission decides that a national do-not-call list is an appropriate method for addressing consumer privacy concerns, the requirements should not apply to telephone calls made by or on behalf of public broadcasters. First, the TCPA specifically excludes calls made by a tax-exempt nonprofit organization from the definition of a telephone solicitation.⁷ Second, in implementing the TCPA, the FCC decided that the exemption for calls made by a tax-exempt organization should apply to telephone solicitations made *by or on behalf of* tax-exempt nonprofit organizations.⁸ The Commission reasoned that “[o]ur rules generally establish that the party on whose behalf

⁵ See NPRM at ¶ 49.

⁶ See *id.* at ¶ 56.

⁷ 47 U.S.C. § 227(a)(3)(C).

a solicitation is made bears ultimate responsibility for any violations. Calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the calls.”⁹ The same rationale applies in the context of a national do-not-call list. It does not make sense to hold public broadcasters liable for actions by for-profit telemarketers acting on their behalf that the public broadcasters could perform themselves.

The FCC’s interpretation of the TCPA should not change simply because the FTC has proposed applying its do-not-call list requirements to for-profit telemarketers making solicitations on behalf of tax-exempt organizations. The FTC bases its asserted authority to apply its do-not-call list requirement to for-profit entities soliciting funds on behalf of charitable organizations on recent amendments to the Telemarketing Consumer Fraud and Abuse Prevention Act contained in the USA PATRIOT ACT of 2001.¹⁰ However, the USA PATRIOT Act does not amend any provision of the TCPA. Moreover, Congress has not indicated in any way that the FCC should reverse course on its long-held interpretation that the TCPA’s exemption for tax-exempt organizations applies to telephone solicitations by or on behalf of a tax-exempt organization.

If the FCC or FTC were to apply national do-not-call list requirements to public broadcasters, or for-profit firms acting on their behalf, the number of individuals who may be contacted via telephone on behalf of public radio stations could shrink

⁸ 47 C.F.R. § 64.1200(f)(3).

⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, CC Docket No. 92-90, 10 FCC Rcd 12391 (1995).

¹⁰ See United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, § 1011, Pub. L. No. 107-56 (Oct. 25, 2001). While the USA PATRIOT Act contains provisions relating to charitable solicitations, it by no means requires that the FTC establish a do-not-call registry or apply do-not-call requirements to calls made by for-profit entities on behalf of tax-exempt organizations.

dramatically. Many individuals may sign up for the registry without realizing that the registry encompasses calls from their local public radio station. As a result, an important source of funding for many public radio stations could be restricted. A decrease in any of a public radio station's limited sources of revenue would place a significant burden on the station and its programming.

The burden placed on public broadcasters' fundraising efforts would not serve a substantial governmental interest,¹¹ since it does not address a specific problem. There is no evidence of any abuses in the telemarketing practices of public radio stations or their agents. Furthermore, public radio stations already have powerful incentives to ensure that telephone solicitations do not alienate current, former or prospective members.

A number of states that have established statewide do-not-call lists have exempted solicitations by or on behalf of charitable organizations.¹² At least one state has exempted specific industries from the application of its do-not-call rules.¹³ If the FCC adopts national do-not-call list requirements, it should follow the lead of these states and exempt solicitations for or on behalf of all charitable organizations or all public radio stations from these rules.

¹¹ Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 565-66 (1980).

¹² See, e.g., Fla. Stat. Ann. § 501.059(1)(a) (applies to calls soliciting the sale of consumer goods and services); Conn. Gen. Stat. Ann. § 42-288a(7) (applies to calls for purpose of engaging in marketing or sales solicitation or soliciting extension of credit for consumer goods or services); Ga. Code Ann. § 46-5-27(b)(3)(C) (exempting calls by or on behalf of a registered charitable organization); Texas Bus. & Com. Code § 43.003 (applies to calls made to solicit the sale of a consumer good or service).

¹³ See, e.g., Fla. Stat. Ann. § 501.059(1)(c)(4) & (5)(c) (exempting newspaper publishers and duly franchised cable television operators calling existing subscribers to sell cable television services).

III. The FCC Should At Least Exempt Telephone Solicitations to Current And Former Members of Public Broadcasters and to Businesses From Any Do-Not-Call Registry Requirements

If the Commission adopts do-not-call registry requirements, but does not exempt solicitations by or on behalf of charitable organizations or public broadcasters, it should apply the “established business relationship” exemption to the do-not-call list requirements. This would at least exempt all calls on behalf of public radio stations to current or former members. The TCPA specifically excludes from the definition of “telephone solicitation” calls or messages “to any person with whom the caller has an established business relationship.”¹⁴ A current or prior public radio membership should clearly meet the definition of an “established business relationship” under the FCC’s rules.¹⁵ Other significant contacts, such as participation in a station contest, should meet the definition of “established business relationship” as well.

Many states also have adopted do-not-call registries with an exemption for telephone solicitations to consumers who have a prior or existing business relationship with the caller or entity on whose behalf the call is being made.¹⁶ Such an exemption is included in the FCC’s current telemarketing rules. Moreover, it is appropriate because (a) individuals are less likely to object to a call on behalf of an organization of which they

¹⁴ 47 U.S.C. § 227(a)(3)(B).

¹⁵ 47 C.F.R. § 64.1200(f)(4).

¹⁶ See, e.g., Fla. Stat. Ann. § 501.059(1)(c)(3); Conn. Gen. Stat. Ann. § 42-288a(9)(C); Ga. Code Ann. § 46-5-27(b)(3)(B); Idaho Code § 48-1003A(4)(b)(i); Mo. Rev. Stat. § 407.1085(4)(b); NY General Business Law § 399-z(1)(j)(ii) & (iii); Tenn. Code Ann. § 65-4-401(6)(B)(iii); Texas Bus. & Com. Code § 43.003(b)(2)(A); Ark. Code Ann. § 4-99-403(5)(A) & (6)(A).

are or have been a member, and (b) public radio stations have strong incentives to ensure that solicitations do not alienate their members.

The Commission also should broaden the exemption proposed by the FTC for calls between telemarketers and businesses. The FTC proposed to exempt calls between a telemarketer and any business, *except calls to induce a charitable contribution*.¹⁷ The FCC should exempt *all* calls between telemarketers and businesses from any do-not-call registry requirements. The TCPA authorizes a national do-not-call registry only with respect to residential subscribers, not businesses.¹⁸ Moreover, subjecting calls to businesses on behalf of charitable organizations to the national do-not-call list requirements could seriously disrupt public radio station efforts to secure program or operational funding from businesses, which the funder is permitted to treat as a charitable contribution for tax purposes.¹⁹

IV. Conclusion

For these reasons, if the FCC decides to establish national do-not-call list requirements, NPR urges the Commission to exempt from any such requirements all telephone solicitations made by or on behalf of charitable organizations or public broadcasters. If it does not exempt all calls made by or on behalf of charitable

¹⁷ See FTC NPRM (proposed rule 310.6(g)).

¹⁸ 47 U.S.C. § 227 (c)(3).

¹⁹ Contributions from businesses comprised 19.4% of the total revenue for public radio in 2000. See Public Broadcasting Revenue, FY 2000, Corporation for Public Broadcasting, March 2002, at Table 2. Business support – frequently in the form of program underwriting or sponsorship – is often the result of telephone solicitations.

organizations or public broadcasters, it should, at the very least, exempt all calls made to current or former members of public broadcast stations and to businesses.

Respectfully submitted,

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